

# ARKANSAS SUPREME COURT

No. CR 05-836

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered

May 11, 2006

LEWIS JAMES WHITE  
Appellant

*PRO SE* APPEAL FROM THE CIRCUIT  
COURT OF PULASKI COUNTY, CR  
2003-359, HON. JOHN LANGSTON,  
JUDGE

v.

STATE OF ARKANSAS  
Appellee

AFFIRMED

## PER CURIAM

In 2003, judgment was entered reflecting that James Lewis White had been found guilty by the court in a trial to the bench of rape of a ten-year-old and a sentence of 240 months' imprisonment was imposed. The Arkansas Court of Appeals affirmed. *White v. State*, CACR 03-1294 (Ark. App. 2004). Subsequently, appellant timely filed in the trial court a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition, and appellant, proceeding *pro se*, has lodged an appeal in this court from that order.

In the instant matter, appellant complains that trial counsel rendered ineffective assistance to appellant during the course of trial counsel's representation. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 64, 146 S.W.3d 871, 876 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been

committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). We find no error and affirm the trial court.

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). In reviewing a claim of ineffective assistance of counsel, the reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *McGehee v. State*, 348 Ark. 395, 72 S.W.3d 867 (2002); *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). To rebut this presumption, appellant must show that there is a reasonable probability that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt. *McGehee, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.* In determining a claim of ineffectiveness, the totality of the evidence before the fact-finder must be considered. *Chenoweth v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000).

On appeal to this court, appellant argues that trial counsel was ineffective for: (1) failing to subpoena witnesses for trial; (2) failing to obtain a continuance; (3) failing to appear at a scheduled hearing; (4) failing to present evidence to rebut testimony of certain witnesses; (5) withdrawing motions seeking a jury trial and to suppress appellant's confession; (6) failing to seek a hearing under the rape-shield statute.<sup>1</sup> Appellant divided his arguments into two points on appeal, although no real distinction exists as all are claims of ineffective assistance.

First, appellant argues that trial counsel failed to subpoena his mother-in-law, Penny White,

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<sup>1</sup>All other claims raised below but not argued on appeal are abandoned. See *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

and his step-daughter, Kendra Duran, as witnesses for trial, and failed to obtain a continuance upon discovery that the witnesses were unavailable to testify. Appellant claims that he gave these names to trial counsel well in advance of trial; however, the record reflects that appellant apprised trial counsel of these witnesses late afternoon on the Friday prior to the start of the trial on Tuesday. Trial counsel sought a continuance in order to secure the attendance of these witnesses for trial, which was denied. On direct appeal, the court of appeals affirmed the trial court's denial of appellant's motion for continuance and found that appellant himself did not act with diligence.

Under *Strickland*, appellant must show that trial counsel's performance was deficient. Here, trial counsel took appropriate measures when appellant provided counsel the names of Ms. White and Ms. Duran the day before the trial. Counsel discovered on Monday, through his investigators, that the witnesses would be unable to testify due to Ms. Duran's surgery scheduled the morning of the trial, and promptly sought a continuance. Given that appellant created the circumstances about which he now complains, trial counsel was not deficient in his actions as to securing the witnesses' attendance at trial.<sup>2</sup> Moreover, the fact that the trial court adversely ruled against counsel's motion for a continuance is not sufficient to prove ineffective assistance. *See Fink v. State*, 280 Ark. 281, 658 S.W.2d 359 (1983). Appellant's argument on this point has no merit.

For his second point, appellant contends that trial counsel failed to appear at a pretrial hearing on May 23, 2003. The docket in this case reflected that an omnibus hearing was scheduled for May

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<sup>2</sup>The record reflects that trial counsel called appellant's roommate as a witness, who testified that the victim admitted she fabricated the allegations against appellant. Also, appellant himself testified in his own defense at the trial, stating that the victim recanted her story and that his confession was false.

Ms. White and Ms. Duran did attend the sentencing hearing but did not testify at that time.

9, 2003, was continued until May 23, 2003<sup>3</sup>, and continued again until June 13, 2003. The docket does not reflect that trial counsel did not attend the hearing. However, appellant states that a colleague of trial counsel's handled the hearing for trial counsel, and apparently requested a continuance. As noted above, the omnibus hearing was continued to June 13, 2003, and handled on that date by trial counsel.

Appellant has failed to show that he suffered any type of prejudice sufficient to meet the standards of *Strickland* as the result of trial counsel's not appearing on May 23, 2003. The record does not reflect that any adverse ruling was made against appellant at the hearing, and another attorney requested a continuance of the omnibus hearing, and the trial court granted the request. Further, appellant himself does not claim that prejudice resulted from trial counsel's actions, but that the incident merely indicated trial counsel's "lack of interest" and "negligence" in handling appellant's case. As shown by the record and by his own words, appellant failed to prove that he suffered prejudice sufficient to meet the second prong of *Strickland*. Therefore, trial counsel was not ineffective as to this point.

Next, appellant claims trial counsel was ineffective for failing to introduce evidence that would contradict the testimony of the victim and her mother. Appellant contends that a medical report would show that the victim was a virgin, and a report from an investigation by the Department of Human Services would show the victim's propensity to fabricate stories, neither of which trial counsel introduced into evidence.

Evidence presented at trial included the victim's testimony regarding two separate incidents when appellant raped her. Appellant confessed to raping the victim on four occasions and forcing

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<sup>3</sup>This date was incorrectly cited by the trial court and by the State on appeal as May 29, 2003.

her to perform oral sex on him once. His confession was introduced into evidence without objection. On appeal, the court of appeals found substantial evidence to support appellant's conviction, although the substantial evidence issue was not preserved for appeal.

The record reflects that trial counsel did question the victim and her mother at trial about matters that contradicted their testimony and called into question their truthfulness.<sup>4</sup> In addition, trial counsel questioned the victim about the medical examination that took place when the victim returned home to her mother in New York State after spending the summer with appellant, and the possibility that her condition at the time of the examination may have occurred due either to trauma or to natural development.<sup>5</sup>

In order to find that trial counsel was ineffective on this point, and to rebut the presumption that trial counsel provided reasonable professional assistance, appellant must show that there is a reasonable probability that appellant would have been found not guilty absent the errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Greene*, 356 Ark. at 64, 146 S.W.3d at 875-876.

Here, even though the victim and her mother were questioned about the victim's fabricating

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<sup>4</sup>Trial counsel questioned the victim's mother and the victim about the investigation by the Department of Human services and the statements made by the victim during the interview, including claims that the victim's mother drank bleach water. Trial counsel asked the victim's mother and the victim numerous cross-examination questions that attacked the victim's and her mother's credibility, such as whether there had been allegations that the victim had been in a pornographic movie, whether the victim made allegations of molestation against five other men, and whether the victim's mother coached the victim's older sister to accuse her father of molestation. Additionally, the victim's mother admitted, without being asked, that she had been hospitalized on four different occasions due to her mental state.

<sup>5</sup>Appellant maintains that this report indicated that the victim was a virgin after these incidents. However, the questions asked by trial counsel would seem to indicate that appellant's recollection of the report findings was not an accurate reflection of the contents of the report. As appellant failed to include this report in his addendum to the court, we are unable to verify the contents of the report with regard to appellant's claim.

stories in the past during the bench trial, the trial court may have found her to be a credible witness and to have been telling the truth in this instance. Further, the trial court could have found appellant guilty based on his confession that he had sexual contact with the victim more often than the number of times the victim described in her testimony. Appellant failed to show how trial counsel's actions resulted in prejudice to appellant or fell below an objective standard of reasonableness.

Finally, appellant contends that trial counsel was ineffective for withdrawing two motions, a motion for a jury trial and a motion to suppress appellant's confession, and for failing to request a hearing under the Arkansas Rape Shield Statute, Ark. Code Ann. § 16-42-101(b).

As to the motion for a jury trial, appellant did not raise this claim in his original Rule 37.1 petition, and the trial court's order does not address this point. It is well-settled that we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Next, appellant alleges trial counsel was ineffective for withdrawing a motion to suppress his confession, which he claims to have been given involuntarily, under duress, while under the influence of medication and was not an "intelligent alternative." Appellant also contends that Special Agent Paulette Ward, to whom appellant gave his statement, promised appellant he would receive probation in exchange for his confession. Citing *Tatum v. State*, 266 Ark. 506, 585 S.W.2d 957 (1979), appellant claims that his confession was admitted into evidence solely due to trial counsel's withdrawal of the motion to suppress<sup>6</sup>, and that the confession "was the sole piece of

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<sup>6</sup>Appellant's reliance on *Tatum* is misplaced. Rather than standing for the proposition that introduction of a confession was *per se* error, the confession in *Tatum* was improperly introduced into evidence as it had been given nineteen days after the defendant received his Miranda warning and had been based upon the promise of a deputy to assist the defendant. Neither factor applies in the instant matter.

evidence used to convict” appellant at trial.

At trial, the State introduced the Miranda Rights form that appellant completed and signed prior to giving his recorded statement wherein he waived certain rights. Also introduced was the interview conducted by Special Agent Ward and the hand-written confession of appellant. In the interview and the confession, appellant affirmatively stated that he was not coerced, threatened, forced or pressured to give the statement, and he was doing so voluntarily. Special Agent Ward testified that she did not make any promises to appellant with regard to his punishment or other arrangements as a result of his confession; nor did appellant seem to be under the influence of any chemical substance.

The trial court stated in its order denying appellant’s Rule 37.1 petition that the motion to suppress was without merit and would have been denied had trial counsel not withdrawn it. We cannot say that appellant in this case provided a basis for the trial court to grant the motion to suppress under the holding of *Tatum* or any other basis, and nothing submitted by appellant, including his claims of paranoia or immense stress, supported a finding that the confession was inadmissible. Further, contrary to appellant’s assertions, as previously discussed, appellant was not convicted solely based upon his confession. Appellant has failed to show that prejudice resulted from the actions of trial counsel in this regard.

Appellant’s last argument is that trial counsel was ineffective for failing to request a hearing under the Arkansas Rape Shield Statute that would have allowed evidence of the victim’s propensity to make accusations of molestation. The record reflects that during the cross-examination of the victim’s mother, as well as at other points during the trial, the court discussed the applicability of the Rape Shield Statute with the attorneys. The trial court gave counsel the opportunity to file a

motion for a hearing to question the victim about prior sexual encounters. After the State rested, trial counsel informed the court that based on research by attorneys in his office, trial counsel would not be filing a motion as appellant was not pursuing a defense of consensual sex between him and the victim.

As discussed previously, trial counsel cross-examined both the victim and her mother vigorously about inconsistencies in their testimony, questioned the veracity of their claims and brought out accusations made by the victim against other men. Appellant has not shown that any other information would have been introduced pursuant to a favorable ruling under the Rape Shield Statute related to prior sexual acts of the victim, rather than the victim's tendency to invent allegations of sexual assault or worse. Moreover, trial counsel's decision not to pursue a motion under the statute was a matter of trial strategy based on reasoned legal judgment and, thus, not grounds for finding ineffective assistance of counsel. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). Appellant has not made a showing that trial counsel's actions resulted in prejudice to appellant; nor has appellant made a showing that trial counsel's actions fell below an objective standard of reasonableness.

For the above stated reasons, the trial court did not err in finding that trial counsel was not ineffective in his representation of appellant.

Affirmed.